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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

THE HONORABLE KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2023-001844

CASE NO. 2019-CP-10-4503

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, ...Respondent,

v.

Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010; Shoreline Farms Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture, L.P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers, Defendants,

Of whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 are the .....Appellants,

AND

Ashley Johnson Beshera as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010, Third-Party Plaintiff,

v.

Nationstar Mortgage LLC, Third-Party Defendant.

APPELLANTS CURTIS ROGERS AND JULIE ROGERS REPLY TO RESPONDENTS' INITIAL BRIEF

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ARGUMENT

A. THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE LANGUAGE OF RULE 40(J), SCRCP.

1. Deutsche conflates the concepts of dismissal verses removal from an active trial roster.

Deutsche has acknowledged that an Order pursuant to Rule 40(j), SCRCP is a dismissal a number of times throughout this litigation. (Appellant Br.., p. 6)("orders striking Actions 1, 2. And 3 under Rule 40(j)); (Deutsche Return to Motion to Dismiss, p. 6)("While there is a basis to consider a case stricken pursuant to Rule 40(j), SCRCP as the equivalent of being dismissed, such a dismissal would necessarily be without prejudice. *See Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015) (finding a case stricken under 40(j) due to bankruptcy is not a dismissal and does not trigger the tolling provision of the rule."); (Deutsche's Return to Motion to Recon. p.2) ("While there is a basis to consider a case stricken pursuant to Rule 40(j), SCRCP as the equivalent of being dismissed, such a dismissal would necessarily be without prejudice. *See Goodwin v. Landquest Development, LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015) (finding a case stricken under 40(j) due to bankruptcy is not a dismissal and does not trigger the tolling provision of the rule."). Likewise, the trial court held a Rule 40(j) Order is a dismissal, (Order, p. 6) which is the law of this case.

Despite this, Deutsche conflates the dismissal determination with the concept of "striking cases from the ***active*** docket." (Appellate Br. p. 7, ("striking cases from the active docket") and p. 8 ("'striking' a case from the active docket…") Rule 40(j), SCRCP, does not use the work *active*. That is a word interjected by Deutsche. Deutsche seems to do this so as to infer that a 40(j), SCRCP Order is similar to the former Rule 40(c)(3), SCRCP which left a case pending. A Rule 40(j), SCRCP Order is a dismissal as Deutsche has conceded and as the trial court determined.

2. Rule 40(j), SCRCP unambiguously states "one time" and the trial court erred by ignoring its use in the Rule.

Deutsche's attempted to distract and confuse by conflating concepts, adding words and deleting words to the Rule, does not defeat the specific language of Rule 40(j), SCRCP. Contrary to Appellant's position there is nothing in Rule 40(j), SCRCP that suggest it "directly implies that a party may implement this procedure more than once through a motion." (Respondent Br., p. 7)

The language of Rule 40(j), SCRCP, states "a party may strike its complaint, counterclaim, cross-claim or third party claim from any docket **one time** as a matter of right provided…" The language is clear. The phrase "one time" and its meaning must be enforced by the courts. *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281 (S.C. App. 2019) To suggest as Respondent does that Rule 40(j), SCRCP may be repeatedly used by way of motion is simply wrong. Deutsche's position is nothing more than unsupported conjecture. Deleting words used and ignoring the specific language of the Rule and ignoring the textual argument made by Appellant is error on the part of both Deutsche and trial judge. The court was required to read the Rule so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." See *Mead v. Beaufort Cnty. Assessor*, 419 S.C. 125, 796 S.E. 2d 165, 170(Ct. App. 2016). The failure to give "one time" meaning was reversible error.

3. Voluntarily dismissing a case multiple-times does have consequences.

Actions 1, 2, and 3 were voluntarily dismissed by the Plaintiff; an undisputed fact. Respondent's argument that multiple dismissals are inconsequential and promoted under the Rules of Civil Procedure is feeble.

The Rules of Civil Procedure must be read together. *Gray v. Bryant*, 298 S.C. 285, 379 S.E. 2d 894 (1988)("It is our view that Rules 59 and 60(b) must be read together."); and *Citizens and Southern Nat. Bank of S.C. v. Construction Enterprises, Inc. of TN*, 424 S.E.2d 530, 309 S.C. 500 (S.C. App. 1992)("When these three rules are read together, as they must be,...") The Rules of Civil Procedure like "statutes that deal with the same subject matter are considered to be in pari materia and must be construed together, if possible, to produce a single harmonious result." *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000)

Both Rule 40 and 41, SCRCP deal, in part, with the dismissal of actions. Rule 40, SCRCP references Rule 41,SCRCP, in its Note to the 1994 Amendment. Both Rules, in part, are designed to curb abuses created by repetitive dismissals. It is well settled in this state "that the plaintiff does not possess the unquestioned right at all times and under all circumstances to voluntarily terminate his action, without prejudice to the bringing of a new action by taking a voluntary nonsuit". *Parnell v. Powell*, 191 S.C. 159, 161 3 S.E.2d 801, 802 (1939) Reading the Rules together clearly shows the intent to limit repetitive dismissals. The Court erred by reading the Rules inconsistent with their meaning thereby coming to an incongruous result.

B. THE COURT'S REFUSAL TO REQUIRE A PARTY TO IDENTIFY THEIR WITNESSES FOR TRIAL IS PREJUDICIAL AND REVERSAL ERROR.

Deutsche claims the Rogers did not support their claim that it is was prejudicial for it not to be required to identify who would appear at trial to prove its case. This is Deutsche's entire opposition to the Rogers' position the court erred by failing to require Deutsche to identify the witness(es) it would bring to trial to testify. It fails.

The purpose of "discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed" *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552

S.E.2d 10, 18 (2001), and to provide "the means to prepare for trial." *Samples v. Michell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (Ct. App. 1997). And when a party fails to submit to discovery it bears the burden of establishing lack of prejudice. *Id.*

Deutsche made no effort to argue a lack of prejudice. No attempt was made to argue against the position that the Rogers would not be able to prepare for trial if it was not provided with witness(es) names. Being deprived a full and fair opportunity to prepare for trial is prejudicial and reversable. *See Downey v. Dixon*, 294 S.C. 42, 362 S.E. 2d 317 (Ct App. 1987)

C. THE OBSTRUCTION OF DISCOVERY PRECLUDED SUMMARY JUDGEMET.

The Rogers Motion to Compel, which was granted in part, was filed on September 7, 2022 followed one month later by Deutsche's Motion for Summary Judgment on October 7, 2022. Although Deutsche argues Barsha cannot step in the shoes of the Rogers and take the position, Deutsch's motion for summary judgment was premature, it argues nothing in opposition to the Roger's position that the deprivation of a full and fair opportunity to complete discovery rendered summary judgment premature. The fact that the Rogers' motion was at least granted, in part, leaving discovery to be completed, establishes a full and fair opportunity to complete discovery did not exist. The trial court committed error. " *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003).

CONCLUSION

Rule 40(j), SCRCP was adopted to curb the abuse of cases being tossed back and forth between the general docket and trial docket. It was created so that cases would be dismissed rather than remain on a docket. The trial court's interpretation of the Rule essentially renders it meaningless by allowing indefinite dismissals. The trial court should be reversed and the case be

dismissed since it is the fourth time the same action for the same reasons has been commenced. If this Court does not reverse the trial court as to its Rule 40(j), SCRCP determination, it should reverse the trial court for all other reasons set froth by the Rogers.

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